Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY-CABLE TELEVISION Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments to Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

COMMENTS OF
THE CALIFORNIA CABLE TELEVISION ASSOCIATION
ON THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

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The California Cable Television Association ("CCTA") hereby submits its comments in the above-captioned proceeding. CCTA addresses only two of the four issues set forth for comment by the Commission--channel sharing and preferential access.

I. INTRODUCTION AND SUMMARY

CCTA believes that the capacity issues[1] and preferential access proposals[2] are inextricably linked. Video dialtone service can enhance consumer choice and competition among

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[1] See Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration, and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 at ¶¶ 268-275 (released November 7, 1994) ("Reconsideration Order").

[2] Id. at ¶¶ 280-284.

programming services only if implemented consistently with the Commission's clear mandate that it be provided on a strict common carrier basis.[3] The Commission has stressed from the outset that implementation of video dialtone should be guided by the core objectives of nondiscrimination and equal access to all potential programmers. A core requirement of the Commission's original Video Dialtone Order is that the telephone company's role be limited to providing "unfettered access for all program providers."[4]

CCTA believes that the basic principles outlined in the Reconsideration Order -- rejection of anchor programming, the description of video provider, and the prohibition on any form of telephone company decision-making on how video programming is presented for sale to consumers -- are consistent with the Commission's original promise for video dialtone and with traditional notions of common carriage.[5] The notion that telephone companies should not directly or indirectly, through ownership or through a non-ownership affiliation relationship or by virtue of a cognizable interest, make decisions about how programming is presented for sale to consumers should guide the

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[3] Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5787 (1992), pets. for review pending sub nom. Mankato Citizens Telephone Co. v. FCC, No. 92-1404 et al. (D.C. Cir. Sept. 9, 1992) (Video Dialtone Order).

[4] Id. at 5805.

[5] Reconsideration Order at ¶¶ 35, 64, 98.

Commission in resolving the capacity and preferential access issues that are part of the Third Further Notice of Proposed Rulemaking in this docket.

A telephone company proposing to offer video dialtone service must establish a basic common carrier platform containing sufficient capacity to serve multiple video programmers and provide nondiscriminatory access to that platform.[6] Other than provision of enhanced or ancillary services, this is the allowable extent of telephone company involvement in the provision of video dialtone service.

In considering these issues, we expect that the Commission will also remain mindful of the statement by the U.S. Court of Appeals for the D.C. Circuit in NCTA v. FCC that, "[v]ideo dialtone is a common carrier service, the essence of which is the obligation to provide service indifferently to all comers,"[7] here, to provide service to all would-be video programmers.

Nondiscriminatory access to the basic video dialtone platform as envisioned by the D.C. Circuit is a critical means of preventing anticompetitive conduct by telephone companies. Telephone companies should not be permitted to involve themselves in the provision of video programming beyond the simple provision of nondiscriminatory access, as many local exchange carriers ("LECs) have proposed in their channel sharing and preferential access schemes in pending Section 214 video dialtone

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[6] Id. at 5787.

[7] 33 F.3d 66, 75 (D.C. Cir. 1994).

applications, including those of Pacific Bell ("Pacific") and General Telephone ("GTE"), discussed below.

The Commission has expressly determined that "if video dialtone is to provide the maximum public interest benefits, we must ensure that video dialtone does not give any provider of competitive services an unfair advantage over its competitors."[8] However, the Commission's goal of equality of access will be rendered meaningless by various proposals contained in the LECs' pending applications. In order to preserve the fundamental common carrier nature of video dialtone service, the LECs' role should be neutral as to the conditions of access to their video dialtone networks.

Unless telephone companies are strictly held by the FCC to their common carrier obligations, they will transform video dialtone service into a clone of existing cable television service, where control over content and conduit are synonymous. This was not the Commission's original intention and would violate the telco-cable cross-ownership ban in the Communications Act.[9]

II. THE LECS SHOULD HAVE NO ROLE IN THE ADMINISTRATION OF CHANNEL SHARING ARRANGEMENTS

The Commission has tentatively concluded that channel sharing mechanisms "can offer significant benefits to consumers,

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[8] Video Dialtone Order at 5805.

[9] See 47 U.S.C. Section 533(b).

programmer-customers, and video dialtone providers, while remaining consistent with the requirements of the cross-ownership provisions of the 1984 Cable Act."[10] However, as the Commission acknowledged, "depending upon how they are structured, these arrangements can raise significant legal and policy issues."[11] To the extent that the Commission permits channel sharing arrangements, they should not be structured or administered by telephone companies, but instead by programmer-customers or independent third parties.

As noted above, the Commission's reaffirmation of the common carrier regulatory model for video dialtone it mandated for the first in its Reconsideration Order underscores the importance of limiting the telephone companies' role to the simple provision of nondiscriminatory access to the video dialtone network. Contrary to these basic principles, a number of video dialtone applicants have proposed to afford preferential treatment to a single favored programmer by permitting it to package and offer half or more of the available analog broadcast channels for resale to other customer-programmers.

For example, Pacific Bell has proposed that Anchor Pacific control 35 of the 70 analog channels on its video dialtone network.[12] In addition to this, Pacific has proposed that

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10 Reconsideration Order at ¶ 274.

11 Id. at ¶ 275.

12 See Applications of Pacific Bell for Section 214 authority under the Communication Act, File Nos. W-P-C 6913, 6914, 6915, and 6916, at 19 (filed December 20, 1993) ("Pacific

another entity commonly owned with Anchor Pacific, California Standard Television Corporation, control carriage of 12-15 broadcast channels as its "channel manager".[13] This will leave a situation in which at least three-quarters of all the analog capacity on Pacific's video dialtone networks will be controlled by a single programmer.

In a recent letter to the Chief of the Common Carrier Bureau, Pacific stated it was willing to consider accepting a condition prohibiting the entity behind Anchor Pacific from controlling both of these functions.[14] This would result in Anchor Pacific's retaining half of the analog channel capacity and some other entity owning and controlling the "channel manager" position. The Commission should make clear in this docket that both the arrangement with the aptly named Anchor Pacific, as originally proposed, be revised, is inconsistent with the rejection of "anchor programming" in the Reconsideration Order.[15]

Moreover, Pacific's agreement with Anchor Pacific calls for an option by Pacific to purchase both Anchor Pacific the broadcast channel manager, California Standard Television Corporation, in the future if Pacific gains First Amendment

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Applications").

[13] Id. at 16.

[14] Letter from Alan Ciampocero, Pacific Telesis, to Kathleen M.H. Wallman, FCC, dated December 7, 1994.

[15] Reconsideration Order at ¶ 35.

rights through litigation or legislation to provide video programming in its service area. The Commission should clarify that such a relationship between customer-programmers and telephone companies in which the telephone company has an option to purchase a custom-programmer is inconsistent with the non discrimination and common carrier principles articulated in the Reconsideration Order. Any arrangement in which a telephone company has a contractual relationship with a customer-programmer where, at some point in the future, ownership of that customer-programmer will be fused with the operator of the video dialtone network necessarily runs the risk that common carriage will be subverted and preferential access afforded to that programmer. This result is inconsistent with the cross-ownership provisions of Section 533(b) of the Communications Act,[16] NCTA v. FCC, and the prohibition against unjust or unreasonable discrimination contained in the Act.[17] The Reconsideration Order makes clear that:

> LECs may not, however, provide or distribute any video programming directly to subscribers in their telephone service area. Further, LECs may not hold a cognizable ownership interest, as defined above, in any entity that provides video programming directly to subscribers in their telephone service area.[18]

An agreement giving a telephone company the right to purchase a customer-programmer on its video dialtone network

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16 47 U.S.C. Section 533(b).

17 47 U.S.C. Section 202(a).

18 Reconsideration Order at ¶38.

the intermediate level of scrutiny applicable to non-broadcast content-neutral restrictions that impose incidental burdens on free speech.[18] To withstand such scrutiny, the Commission would have to establish that (a) video dialtone preferences further an important governmental interest that is unrelated to the suppression of free expression, and (b) they do not burden substantially more speech than is necessary to further that interest.[19] Under this analysis, video dialtone preferences which favor broadcast programmers over non-broadcast programmers would fail.

The Commission has articulated three public interest objectives in support of its video dialtone policies: "facilitating competition in the provision of video services; promoting efficient investment in the national telecommunications infrastructure; and fostering the availability to the American public of new and diverse sources of video programming."[20] While each of these goals may be important in the abstract, there is no evidence that any of them would be served by the implementation of discriminatory video dialtone access or rate policies that favor broadcasters over other video programmers.[21] Nor is there any proof that such preferences are, in fact, necessary to advance those interests, or that they

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18 See Turner, 114 S.Ct. at 2469.

19 Id.

20 Reconsideration Order at ¶ 3.

21 Turner, 114 S.Ct. at 2470.

demonstrated how its proposal could satisfy the Commission's requirements that sufficient capacity be made available for several additional video programmers.

Not only does GTE's video dialtone proposal fail to provide sufficient analog capacity to multiple video programmers as required by the Commission, it proposes to reallocate capacity to a single customer-programmer if its capacity is not filled within six months.[22] It is unclear whether GTE means to allocate 50 percent of all of its channels, both analog and digitally engineered, to a single entity. If so, one entity could be allocated only one-half of total channels, but still control all of the system's analog channels. Under GTE's loose formulation of its capacity test, one programmer could thereby dominate its video dialtone service.

By proposing to contract with a single entity to serve as an "administrator" of the analog channels, video dialtone applicants such as Pacific and GTE will consequently make individualized decisions on who to deal with and on what terms. This is contrary to the common carrier obligation to serve all persons indifferently. These proposals are totally at odds with the Commission's vision and requirement of a basic common carrier platform for video dialtone service.

Channel sharing arrangements such as Pacific's and GTE's are essentially a repackaged version of the anchor programmer

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[22] GTE Applications at 12.

proposals, which have already been rejected by the Commission.[23] Because the Commission has found that the anchor-programmer proposals to "allocate all or substantially all analog capacity to a single 'anchor programmer' . . . would thus be inconsistent with the common carrier model for video dialtone and [the] requirement that LECs offer sufficient capacity to accommodate multiple video programmers,"[24] the LECs' channel sharing arrangements should similarly be rejected.

Like the anchor programmer proposal, the channel sharing arrangement would impermissibly involve LECs in the provision of video programming directly to subscribers. For example, Pacific claims that the anchor-programmer would choose the packaging and tiering of the basic video dialtone platform, but through a multitude of guidelines, restrictions, and conditions on the administrator's packaging and resale of the video services, Pacific has proposed to retain a significant degree of control over the provision of video programming.[25]

The proposals for channel sharing involve a "hands-on" management approach to providing video dialtone service that blurs the distinction and transforms the proposed video dialtone system into a cable system. The current channel sharing proposals are analogous to the anchor-programmer proposals. This

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[23] Reconsideration Order at ¶ 35.

[24] Id.

[25] See Applications of Pacific Bell for Section 214 Authority, W-P-C 6913, 6914, 6915, and 6916 at Illustrative Tariff (filed December 20, 1993).

would be inconsistent with NCTA v. FCC, where, as noted above, the Court emphasized that:

> "Video dialtone service and cable system service are very different creatures: video dialtone service is a common carriage service, the essence of which is an obligation to provide service indifferently to all comers -- here, to provide service to all would-be video programmers."[26]

The FCC's purpose was not to allow Pacific, GTE and other telephone companies to create a clone of a cable system's programming format without obtaining a franchise or complying with the other provisions of Title VI of the Communications Act applicable to cable operators. In amending its rules to permit video dialtone service, the Commission distinguished the limited role of telephone companies in the offering of video programming from the traditional role of cable operators.

> Cable operators select video programming by making decisions concerning the price of video program offerings and by bundling, packaging, and creating tiers of video programming that affect the availability of video programming to consumers.[27]

Telephone companies, by comparison, were permitted to have no role in the selection and pricing of service.[28] The LECs' proposed channel sharing arrangements are dramatically at odds

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[26] 33 F.3d at 75.

[27] Video Dialtone Order, 7 FCC Rcd. at 5817.

[28] Id. at 5817-18. See also id. at 5818 n.180 ("[B]ecause they will be precluded from activities such as pricing of, owning, and exercising editorial control over video programming, [even] telephone companies providing video gateways will not be selecting video programming in the manner of traditional cable operators.").

that could withstand heightened scrutiny and justify a mandate of preferential access in order to further these goals. The Commission would have to establish that such video dialtone preferences further an important governmental interest, do not burden substantially more speech than is necessary to further that interest, and are unrelated to the suppression of free speech.[31] In the absence of any substantial evidence as to need, the Commission should reject any policy according preferential access under a common carrier regulatory model.

While the broadcasters or telephone companies may argue that discriminatory video dialtone preferences are necessary to preserve the continued viability of local, over-the-air broadcasting, this argument has already been rejected. In the Turner cable system must-carry decision, the Supreme Court made clear that:

> "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more that simply 'posit the existence of the disease sought to be cured.' Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[32]

The Turner case was remanded for further evidence on the questions of whether the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must carry, and whether the must carry rules are sufficiently

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31 Turner, 114 S.Ct. at 2469-72.

32 Id. at 2470.

tailored to avoid burdening more speech by cable operators and cable programmers than is necessary to achieve the government's interests.

Discriminatory preferences that favor broadcasters over other classes of video programmers over systems video dialtone will not withstand First Amendment scrutiny unless the Commission is able to prove that they promote important governmental objectives in a direct and material way, and without burdening substantially more speech than is necessary to achieve those interests. There is no specific evidence upon which the FCC could base such an argument, particularly in light of the fact that video dialtone has yet to be offered by the telephone companies, and whether broadcasters will or will not be able to gain access to video dialtone platforms on a non-preferential basis has not yet been demonstrated.

B. Preferential Treatment For Certain Classes of Video Programmers Is Contrary to Commission and Congressional Intent

Because of its nondiscrimination objective, the Commission specifically refrained in its initial Video Dialtone Order from requiring telephone companies to set aside capacity at free or reduced rates for any class of video service providers. Specifically, the Commission found that "it would be unwise at this time to incorporate into our nondiscrimination objective a

policy which favors certain groups of speakers over others."[33] Since video dialtone has yet to be offered to the public, circumstances have not changed since the FCC last spoke on this issue to warrant creation of favored groups of speakers by the telephone companies.

Moreover, if Congress had intended all multichannel video providers to be required to carry local broadcast channels, or to give them a preference, it would have done so. The issue has been recently before Congress, and Congress did not choose to provide such a preference to broadcasters. With full awareness of competing technologies, Congress did not, in implementing the 1992 Cable Act, impose such requirements on DBS, MMDS, or other telecommunications providers. The telephone companies' decision to carry broadcasters at preferential rates is not one dictated by, or apparently supported by Congress.

The Commission also explicitly declined "to impose a federal video dialtone access charge or to require reduced access fees for certain programmers or to impose federal PEG access requirements upon local telephone companies."[34] The Commission found it more appropriate for nonprofit entities to obtain funding for video dialtone access from the Congress or state legislatures.

Offering certain channels to any select group is fundamentally inconsistent with the policies behind the video

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33 Video Dialtone Order at 5805.

34 Id.

dialtone concept. Such an allocation is the antithesis of nondiscriminatory access to the basic platform. Most critically, it disadvantages other programmers, who will have to pay more for access to the platform in order to subsidize the costs of the network not paid for by the broadcasters, PEG users, or other preferred programmers.

CONCLUSION

For the above reasons, CCTA urges the Commission to resist the telephone companies' efforts to involve themselves deeply in channel sharing arrangements and to provide preferential access to any favored programmers.

Respectfully submitted,

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